

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**REINA SALCIDO**

Claimant

VS.

**WAL-MART ASSOCIATES**

Respondent

AND

**AMERICAN HOME ASSURANCE CO.**

Insurance Carrier

Docket No. 1,005,622

**ORDER**

Claimant requested review of the November 25, 2003 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on May 4, 2004.

**APPEARANCES**

Chris Miller, of Lawrence, Kansas, appeared for the claimant. Jon Newman, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that claimant's average weekly wage is either \$249.01 per week or \$416 per week, depending on the Board's determination of whether claimant was part-time or full-time hourly employee. Further, claimant's counsel agreed the information contained within the Stipulation and Agreement, which itemized the amount of temporary total disability paid by respondent and filed with the Court, is accurate and to be considered part of the record.

**ISSUES**

The ALJ found that claimant suffered personal injury by accident on July 16, 2002 while in respondent's employ. However, he concluded she failed to establish that her need for extended medical treatment and ultimately surgery was due to her work-related injury. The ALJ found the remaining issues presented to be moot and were therefore not addressed.

The claimant requests review of the ALJ's decision alleging he erred in determining that claimant suffered no permanent impairment as a result of her employment with respondent. Claimant argues that she is entitled to a functional impairment between 10 and 25 percent to the body as a whole for the back strain she sustained in her work-related accident. Although claimant concedes she had a history of back complaints before her July 16, 2002 accident, she maintains that her preexisting impairment is, at best, 5 percent. Claimant also contends the evidence supports her belief that she was a full-time worker expected to work 40 hours per week. Accordingly, claimant urges the Board to find her average weekly wage to be \$416 per week, based on her hourly rate of pay.

Respondent argues the evidence overwhelmingly supports a finding that claimant did not suffer any accidental injury arising out of or in the course of her employment on July 16, 2002, thus negating any liability in this matter. In the alternative, the respondent asserts the ALJ was correct in finding claimant suffered nothing more than a temporary aggravation of a preexisting condition followed by an unrelated superceding, intervening accident.

Respondent also takes issue with claimant's average weekly wage, assuming that issue is reached, maintaining the evidence contained within the record supports a finding that claimant was a part-time employee, working an average of 24.85 hours per week which yields an average weekly wage of \$249.01 per week.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

On July 16, 2002, claimant slipped on the contents of a spilled bottle of shampoo while at work. As she slipped, she grasped a shopping cart but twisted her back. According to claimant, all of her subsequent back complaints relate to this July 16, 2002 accident, although her E-1 (Notice of Hearing) references a repetitive injury beginning July 16, 2002 and continuing until January 20, 2003.

Claimant informed her supervisor of her injury and was referred to Dr. Michael Geist on the same day of her accident. Her only complaints on that date were diffuse tenderness

to the low back with a demonstrated limitation in her range of motion. He observed symmetrical reflexes and intact motor skills. Dr. Geist found claimant could successfully heel and toe walk. Claimant disclosed the fact she had undergone back surgery and advised she had done well since her surgery.<sup>1</sup> This prior history is critical to the Board's determination and must necessarily be discussed in detail.

The claimant's earlier back complaints, which ultimately led to surgery in 2000, apparently occurred, in part, while claimant was working for respondent, but was not the subject of any workers compensation claim. The record indicates claimant sought treatment for low back problems as far back as 1997. In July of 2000, claimant again sought treatment from Dr. Pamela Huerter and advised of a long history of both upper and lower back pain that had become worse in the last 3 months. Claimant related an incident 19 years earlier when she fell while skating. Claimant also reported numbness in the lower extremities along with incontinence. Dr. Huerter diagnosed probable cauda equina syndrome and immediately referred claimant to Dr. Richard Wendt, an orthopaedic physician, for an evaluation.

Dr. Wendt evaluated claimant and noted that she was voicing low back complaints. He referred her to Dr. Paul Morte, a neurologist for a further evaluation and also to Dr. Mark Bernhardt, who ultimately performed a laminotomy and discectomy at the L5-S1 level on July 18, 2000.

Following this surgery, claimant continued treatment with a chiropractor, Dr. Dennis Anthony, reporting low back pain, mid back pain and leg pain. Claimant also sought treatment with Dr. Wendt in December 2000 and again with Dr. Huerter beginning in March 2001. Claimant had complaints of numbness in her right foot as well as episodes of falling due to the numbness. Dr. Huerter referred her back to Dr. Wendt because of these complaints. In April 2001 claimant reported to Dr. Wendt that she had fallen two weeks earlier and experience right foot numbness and weakness.

Unfortunately, Dr. Geist did not have any of claimant's prior medical records setting forth the extent of her complaints and treatment which he could have reviewed in connection with claimant's treatment in 2002.

Claimant returned to see Dr. Geist on July 17, 2002, the day after her accident, and again on July 23, 2002 for a recheck. According to Dr. Geist's records, claimant commented that her back is "feeling significantly better. The low back is pretty much back to normal for her . . . no pain or paresthesias to the extremities, bowel or bladder complaints."<sup>2</sup>

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<sup>1</sup> Geist Depo. at 9.

<sup>2</sup> *Id.*, Ex. 2 at 1.

Claimant again returned to Dr. Geist on July 30, 2002 and reported right leg numbness associated with a fall outside her house. His notes indicate claimant advised she was “feeling quite a bit better and then this Saturday, three days ago, she was walking and she started having significant numbness and weakness in her right leg and actually fell.”<sup>3</sup> There are differing descriptions of this fall at home. At one point, claimant indicated she felt a sudden numbness in her neck and felt a sharp pain going from her neck to her leg, causing her to fall.<sup>4</sup> Dr. Geist ordered an MRI of the lumbar spine which was done on July 30, 2002. This test was interpreted by Dr. Scott Patrick, a radiologist. He concluded claimant was suffering from recurrent disc protrusion filling the right posterior lateral recess and neural foramina at the L5-S1 level, with impingement likely on the right L5 nerve root.

Claimant returned to see Dr. Geist in August 2002 but at this point, he was unable to conduct a full examination because claimant was so tearful. Claimant reported a decreased sensation which had a non-anatomical distribution radiating in the right lower extremity.

Claimant’s care was transferred to Dr. Reed who subsequently performed surgery for the recurrent disc herniation. Dr. Reed did not testify during the trial of this matter.

At her counsel’s request, claimant was evaluated by Dr. Edward J. Prostic. He saw claimant on November 25, 2002 and again on February 4, 2003. Dr. Prostic diagnosed a recurrent disc herniation at L5-S1. He assigned a 25 percent functional impairment to the whole body as a result of claimant’s low back complaints, all of which he apparently attributed to the July 16, 2002 accident.<sup>5</sup>

Dr. Fred A. Rice examined claimant on March 5, 2003. According to Dr. Rice, claimant indicated she had a good result from her 2000 surgery and that her symptoms improved. But following the July 16, 2002 accident, her symptoms returned and gradually got worse until she had a second surgery.

Dr. Rice concluded claimant’s past medical records were at odds with her recitation of her condition following the 2000 surgery. Put simply, he reviewed the medical records as well as the results of the May 10, 2001 MRI and found that claimant was experiencing ongoing problems before her July 16, 2002 accident. He further found her objective physical presentation was inconsistent with her present complaints. Dr. Rice diagnosed

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<sup>3</sup> *Id.*, Ex. 2 at 3.

<sup>4</sup> P.H. Trans. (Apr. 1, 2003) at 12.

<sup>5</sup> Prostic Depo. at 6. All ratings are consistent with the principles set forth in the A.M.A. Guides (Guides). American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

chronic low back and right leg pain as a result of previous surgery, degenerative changes and extensive scarring.<sup>6</sup>

When deposed, Dr. Rice testified that claimant's July 16, 2002 accident was neither causally related to the fall at home nor her subsequent need for surgery. He opined that she reached maximum medical improvement as of July 23, 2002 and suffered no permanent impairment as a result of her temporary aggravation of her chronic low back complaints.<sup>7</sup>

At the ALJ's request, the claimant was evaluated by Dr. Sergio Delgado. Following his examination of claimant, he concluded claimant suffered an acute back strain that was temporary in nature. In taking a history, claimant disclosed not only her 2000 surgery but that she had fallen on July 27, 2002, describing an incident where she was drowsy from medication. This is a wholly different description from that provided to the other practitioners. Dr. Delgado reviewed the relevant medical records, even going so far as to compare the May 10, 2001 MRI results with that obtained on July 30, 2002. He concluded the two results were essentially the same, thus indicating no difference in her structural findings following the July 16, 2002 accident. Dr. Delgado ultimately testified that claimant does not have an impairment attributable to the July 16, 2002 accident.<sup>8</sup> He conceded that if you accept claimant's version of her subsequent accident on July 27, 2002, her present complaints are related to her work-related event. Nonetheless, he remained unpersuaded and maintained his position that claimant suffered a temporary aggravation and has sustained no further permanency.

The opinion that claimant sustained only a temporary strain of her back on July 16, 2002 is further bolstered by the testimony of Dr. Patrick, a radiologist, who personally examined both MRI films and concluded claimant suffered from a recurrent disc protrusion as of July 30, 2002 which was present on May 10, 2001. Although there is a slight difference between his written opinion on the July 30, 2002 report and that generated by another radiologist in his practice, he believes the films reveal the same process, that scar tissue is causing pressure on the nerve root. Thus, it is his opinion that there has been no structural change in claimant's body. Put simply, claimant has not suffered any permanent injury nor any structural change in her spine as a result of the July 16, 2002 accident.

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<sup>6</sup> Rice Depo. at 16.

<sup>7</sup> *Id.* at 16-17.

<sup>8</sup> Delgado Depo. at 38.

The Board has reviewed the medical evidence offered by the parties in excruciating detail and concludes the ALJ's findings are well founded.<sup>9</sup> Before the July 16, 2002 accident, claimant had a long standing history of low back pain, incontinence, radiating pain into one or more of her legs and some difficulty walking and standing and even falling. After surgery in 2000, she continued to experience problems with pain in her back and radiating into her right lower extremity.

Immediately after her work-related accident on July 16, 2002, she received treatment and as of July 23, 2002, she was reporting improvement and was "pretty much back to normal."<sup>10</sup> This evidence, standing alone, substantiates the ALJ's finding of personal injury by accident.

"Personal Injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such a character as to present external or visible signs of its existence.<sup>11</sup>

An injured employee's testimony, if credible, is sufficient to establish accidental injury.<sup>12</sup> Uncontradicted evidence that is not improbable or unreasonable cannot be disregarded.<sup>13</sup>

Given claimant's unchallenged description of her accident, the sudden spike in her symptoms and the medical treatment provided immediately thereafter substantiates the ALJ's finding.<sup>14</sup> Likewise, the Board affirms the ALJ's conclusion with regard to the temporary nature of claimant's back strain. The burden of proof is upon the claimant to establish her right to an award.<sup>15</sup> The Board believes the claimant has failed to sustain that burden.

The physical complaints voiced by claimant following the July 16, 2002 accident are nearly identical to those voiced back in 2000. Although claimant has, at times, indicated

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<sup>9</sup> The ALJ indicated the "evidence [in this claim] to be muddled." ALJ Award (Nov. 25, 2003) at 3. This is accurate.

<sup>10</sup> Geist Depo. at 13.

<sup>11</sup> K.S.A. 2002 Supp. 44-508(e).

<sup>12</sup> *Hardwell v. St. Louis S. & R. Co.*, 146 Kan. 870, 73 P.2d 1120 (1937).

<sup>13</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>14</sup> ALJ Award (Nov. 25, 2003) at 3.

<sup>15</sup> K.S.A. 2002 Supp. 44-508(g).

she received a good result from her 2000 surgery, the medical records do not bear that out. She has received ongoing medical treatment from various providers which included diagnostic testing, including an MRI on May 10, 2001. The medical treatment she received immediately after the July 16, 2002 accident addressed her complaints and by July 23 she had rebounded to her pre-injury state. Her subsequent fall on July 27, 2002, is expressly found to be unrelated to her work-related event as well as all subsequent treatment including the surgery by Dr. Reed. Because claimant failed to meet her burden of proof, the ALJ's Award is affirmed in all respects.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 25, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Jon Newman, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director